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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

## No. 367.

ANTHONY FERRARA,
*Petitioner,*

vs.

CONNECTICUT FIRE INSURANCE COMPANY AND HAWKEYE-SECURITY INSURANCE COMPANY,
*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

### ARGUMENT.

I.

**The Appellate Court followed the Substantive Law of Missouri in holding that a criminal may not profit from his own crime in a civil action brought by him and that therefore his prior criminal conviction was admissible in evidence to establish the truth of the facts upon which it is based.**

The appellate court based its decision on two principal grounds: (1) That the law of Missouri and the law of the United States does not permit a criminal to profit by his crime in a subsequent civil action by him and (2) that the evidence adduced by the respondents was more complete in the civil case than was the evidence adduced in the criminal case which convicted Ferrara of arson and therefore there was no substantial evidence supporting the decision of the finder of the fact that Ferrara was not guilty of arson (App. A9).

The appellate court was correct in holding that the rule permitting the conviction of the insured to be considered in a subsequent civil action brought by the criminal defendant in order to profit from his crime, is sound and in support of the public policy of Missouri and of the land. To hold otherwise, would be to flaunt justice and right and support the criminal.

This Supreme Court in *Burt* v. *Union Central Ins. Co.*, 187 U.S. 362, 23 S. Ct. 139, 141, 47 L. Ed. 216, held that the criminal conviction was admissible and an adjudication of the insured's guilt. In following the Burt case, the court in *Diamond* v. *New York Life Ins. Co.*, 50 F.2d 884, 887 (C.C.A. 7, 1931), stated:

> "* * * the only question is one of proof. The Burt case is therefore an authoritative and binding holding that the evidence subjected to was competent and relevant."

*U. S.* v. *Silliman*, 167 F.2d 607, 619 (C.C.A. 3), 1948, also following the Burt case held:

> "* * * We think further, that the public policy of holding parties to one day in court is one which has recently found firm support and sound extension by the court whose authority binds us. * * *"

*Hurd* v. *Hodge*, 334 U.S. 24, 34-35, 92 L. Ed. 1187, 1195, 68 S. Ct. 847, 853, which states in following the Burt case:

> "* * * The power of the Federal courts to enforce the terms of private agreements is at all times exercised subject to restrictions and limitations of the public policy of the United States and manifested in the construction, treaties, Federal Statutes and applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of the courts to refrain from such exertions of judicial power".

*Austin* v. *United States*, 125 F.2d 816 (C.C.A. 7) 1942 also held that a conviction of murder was admissible.

*Twentieth Century Fox* v. *Lardner*, 216 F.2d 844, 850 (C.C.A. 9) 1954 holds that the record of criminal conviction is the best evidence that a crime was actually committed and is therefore admissible. See also *Emick Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558, 569, 95 L. Ed. 534; 71 S. Ct. 408, Cert. den. 341 U.S. 906, 95 L. Ed. 1345, 71 S. Ct. 610, where this Supreme Court, in holding the criminal conviction of General Motors admissible, stated at page 569:

> "* * * Accordingly, we think plaintiffs are entitled to introduce the prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based."

See also *U. S.* v. *Empire Packing Co.*, 174 F.2d 16 (C.C.A. 7) 1949.

Also under Rule 43(a), Federal Rules Civil Procedure, the trial court should have received in evidence the criminal conviction of Anthony Ferrera when offered by the respondents and to consider such conviction in arriving at

its decision. The court, however, refused the offer both during trial and in the after trial motion to vacate.

The appellate court's decision followed the proper substantive law of Missouri that a criminal may not profit from his crime in a subsequent civil action. See *Grose* v. *Holland*, 1948, 211 S.W.2d 464; 466 and cases cited at App. A7. The law of the land does not permit a criminal to profit from his crime. See *New York Mutual Life Insurance Company* v. *Armstrong*, 1886, 117 U.S. 591, 600.

There is no Missouri decision contrary to the rule followed by the appellate court, but such rule has inferentially recognized that public policy must prevail and a criminal conviction is admissible where the criminal attempts to profit by his crime. See *Osborn* v. *Gibson* K. C. Ct. of App., 1958, 309 S.W.2d 15.

*Skelgar* v. *Downey*, St. L. Ct. of Apps. 1926, 285 S.W. 148 and cases cited at App. A4 are cases where a civil action was brought against the criminal defendant, not by him, to recover damages. The plaintiff there was attempting to recover damages from the criminal defendant for an assault and this is distinguishable from the case where the criminal himself is suing and attempting to profit from his own crime. There is a good and sufficient reason for the admission of the conviction of the criminal in evidence in a case where the criminal is attempting to profit—the reason is public policy. In the *Skelgar* type case, however, *the essential element of public policy* is missing.

The decision of the appellate court was not contrary to *Erie Railroad* v. *Tomkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, for it followed the proper substantive law of the State of Missouri in holding that a criminal cannot profit from his crime and the criminal conviction is admissible.

II.

**The decision of the Appellate Court was based on the record before it.**

The petitioner erroneously concludes in Reason 3, that the Appellate Court failed to base its holding on the record before it and based it entirely on the criminal conviction. Such is not the case and a review of the record in this case will so disclose.

Evidence of (I) the explosion (R. 14, 39, 46); (II) the violence thereof (R. 39, 43, 46, 52, 54, 55); (III) the quick burning nature of the fire (R. 39, 46, 53, 55, 57); (IV) black carbon smoke from the fire (R. 39, 53); (V) the chemical analysis of the distillate derived from the [illegible] (R. 47-49); (VI) the absence of any gas leaks or natural cause of fire (R. 43, 58, 60, 61, 62) were all proved before the trial court in the civil action as were the same facts in the criminal action.

See *State* v. *Ferrara*, 1958, 320 S.W.2d 540, which has identical facts set out in the opinion of the Missouri Supreme Court.

Certainly this was substantial and poignant evidence that petitioner had committed arson. Thus the finding of the trial court that petitioner had not committed arson was unsupported by substantial evidence and the appellate court so held (App. A9).

The appellate court consequen[illegible] did not go outside the record but made its holding on the facts in evidence and in the record of the civil action before it. It is only a conclusion of the petitioner, not based on fact that the opinion of the appellate court was from "evidence adduced in the state court taken out of context from the opinion of the Missouri Supreme Court in *State* v. *Ferrara* rather than the record

in the case at bar" (Brief 8). Petitioner is in no position to read the mind of the appellate court and blandly state that that court made its decision on evidence outside the record.

Accordingly, the Appellate Court did follow the rule in *Travelers Insurance Company of Hartford* v. *Childs*, 252 F.2d 889 (C.C.A. 2), for it decided the issues according to its individual estimate of the issues and facts before it.

## CONCLUSION.

For the foregoing reasons the petition for the writ of certiorari should be denied.

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## CERTIFICATE.

I, Glenn E. McCann, one of the attorneys for the Respondents herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 22nd day of September, 1960, I served copies of the foregoing Brief of Respondents in opposition to Petition for a Writ of Certiorari of Petitioner by leaving a true and correct copy with Joseph S. Levy, Paul Margolis, Jr., and Bernard D. Craig, 916 Walnut Street Building, Kansas City, Missouri, attorneys of Record for Petitioner in strict compliance with Supreme Court Rule 33.

GLENN E. MCCANN.